Tiffany Chau v Jabatan Imigresen Malaysia & Anor

HIGH COURT (IPOH) — ORIGINATING SUMMONS NO AA-24NCVC-29–01 OF 2019
HASHIM HAMZAH J
18 JUNE 2019

Civil Procedure — Parties — Proper party to action — Action for mandamus against respondents — Whether respondents were correctly named

Evidence — Hearsay — Affidavit — Weight — Affidavit in support by applicant — Facts deposed in affidavit could only be verified by applicant's mother — Probative value and weight — Whether applicant's deposition in affidavit was hearsay — Rules of Court 2012 O 41 r 5(1)

Public Authorities — Remedies — Mandamus — Applicant filed originating summons for order of mandamus against respondents to issue entry permit to applicant — Whether applicant had specific legal right — Whether applicant's injury resulted from forbearing or doing of statutory duty by person who held public office — Whether applicant had alternative remedy — Whether applicant fulfilled conditions for mandamus order under s 44(1)(a) and (1)(d) of the Specific Relief Act 1950 — Specific Relief Act 1950 s 44(1)(a) & (1)(d)

The applicant, an American citizen had applied for entry permit from the first respondent but the first respondent had rejected the application due to the facts that the applicant had only obtained 35 out of 120 marks, to which the passing mark was 65 marks. The applicant then appealed to the second respondent and pending such appeal, the applicant filed the present originating summons for, inter alia, the following reliefs: (a) an order for mandamus to issue an entry permit to the applicant by the first respondent; (b) an order for mandamus against the respondents to consider, allow and endorse the entry permit to the applicant before the citizenship status was awarded to the applicant under art 19(1) of the Federal Constitution; and (c) an order of mandamus against the respondents or any other public authorities to take action which was reasonable in order to execute the order of the court. The issues arose were: (a) whether the applicant had fulfilled the conditions for a mandamus order under s 44(1)(a) and (1)(d) of the Specific Relief Act 1950 ('the SRA'); (b) whether the applicant's deposition at para 5 of the applicant's affidavit in support affirmed on 23 January 2019 ('the applicant's affidavit in support') was hearsay evidence;

and (c) whether the respondents were correctly named in the present case. A

Held, dismissing the applicant's application with no order as to costs:

(1) The first limb under s 44(1)(a) of the SRA was that the applicant must show that she had a specific legal right to the relief sought. The applicant had no specific legal right to the relief sought in the present application since any decision of the Minister or the Director General of Immigration under s 59A(1) of the Immigration Act 1959/63 ('the Act') could not be reviewed or appealed at all unless it could be shown that there was a non-compliance with procedural requirements of the Act or the regulations governing that Act or decision. In the present case, there was nothing in the applicant's affidavit evidence to show that there was any breach of procedural requirements in the exercise of the first respondent's discretion under ss 3(2), 10, 13 of the Act as all the standard operating procedures under the 'Pekeliling Imigresen Malaysia Terhad Bil 3 Tahun 2010 — Garis Panduan Permohonan Permit Masuk Mengikut Kaedah Sistem Mata (Point System)' had been complied with (see paras 21, 23 & 27). B C D

(2) The second limb that must be satisfied by the applicant under s 44(1)(a) of the SRA was that the applicant's injury was resulted from the forbearing or doing of a statutory duty by a person who held public office. In the present case, the applicant failed to show any failure on the part of the first respondent to perform any statutory duties compelled to them in law. On totality, the applicant had failed to establish the necessary requirement under s 44(1)(a) of the SRA (see paras 30 & 32–33). E F

(3) Since the applicant had alternative remedy under the law and had in fact appealed against the decision of the first respondent to the second respondent, the court found that the applicant had failed to satisfy the necessary requirement under s 44(1)(d) of the SRA (see para 40). G

(4) The applicant's deposition at para 5 of the applicant's affidavit in support was made in contravention with O 41 r 5(1) of the Rules of Court 2012. An affidavit must contain facts that the deponent to his/her own knowledge was able to prove. The facts deposed therein could only be verified by the applicant's mother since the applicant had no direct knowledge regarding what actually transpired. This evidence was purely hearsay. Failure to observe the abovementioned requirement would discard the particular deposition or evidence of any probative value and the impugned statement may be expunged by the court. As such, in the present application, the court gave no weight to the applicant's H I

deposition in para 5 of the applicant's affidavit in support for being purely hearsay evidence (see paras 45–47).

(5) The present application was filed against the respondents ie Jabatan Imigresen Malaysia (Cawangan Perak) as the first respondent and Kementerian Dalam Negeri Malaysia as the second respondent which were not entities recognised by the relevant laws. The applicant did not apply to amend the parties to the present application. Hence, the applicant's application was doomed to fail from the very beginning (see paras 48–49).

[Bahasa Malaysia summary

Pemohon, seorang warganegara Amerika telah memohon permit masuk dari responden pertama tetapi responden pertama telah menolak permohonan tersebut di atas fakta bahawa pemohon hanya memperoleh 35 dari 120 markah, yang mana markah lulus adalah 65 markah. Pemohon kemudian mengemukakan rayuan kepada responden kedua dan sementara menunggu rayuan tersebut, pemohon memfailkan saman pemula ini untuk, antara lain, relief berikut: (a) perintah mandamus terhadap responden pertama untuk memberikan permit masuk kepada pemohon; (b) perintah mandamus terhadap responden-responden untuk mempertimbangkan, membenarkan dan mengesahkan permit masuk kepada pemohon sebelum status kewarganegaraan diberikan kepada pemohon di bawah perkara 19(1) Perlembagaan Persekutuan; dan (c) perintah mandamus terhadap responden-responden atau mana-mana pihak berkuasa awam lain untuk mengambil tindakan yang wajar untuk melaksanakan perintah mahkamah ini. Isu-isu yang timbul adalah: (a) sama ada pemohon telah memenuhi syarat untuk perintah mandamus di bawah s 44(1)(a) dan (1)(d) Akta Relief Spesifik 1950 ('ARS'); (b) sama ada pernyataan pemohon pada perenggan 5 afidavit sokongan pemohon yang disahkan pada 23 Januari 2019 ('afidavit sokongan pemohon') adalah keterangan dengar cakap; dan (c) sama ada responden-responden dalam kes semasa dinamakan dengan betul.

Diputuskan, menolak permohonan pemohon tanpa perintah untuk kos:

(1) Syarat pertama di bawah s 44(1)(a) ARS adalah pemohon mesti menunjukkan bahawa dia mempunyai hak undang-undang yang khusus terhadap relief yang dimohon. Pemohon tidak mempunyai hak undang-undang yang khusus ke atas relief yang dimohon dalam permohonan ini kerana keputusan Menteri atau Ketua Pengarah Imigresen berdasarkan s 59A(1) Akta Imigresen 1959/63 ('Akta') tidak boleh disemak atau dirayu sama sekali kecuali jika dapat ditunjukkan bahawa terdapat ketidakpatuhan terhadap syarat-syarat prosedur di dalam Akta atau peraturan yang mengawalselia Akta atau keputusan tersebut. Dalam kes semasa, tidak ada apa-apa di dalam keterangan afidavit pemohon yang menunjukkan bahawa terdapat

pelanggaran syarat-syarat prosedur dalam pelaksanaan budi bicara responden pertama berdasarkan ss 3(2), 10, 13 Akta kerana semua prosedur operasi standard di bawah 'Pekeliling Imigresen Malaysia Terhad Bil 3 Tahun 2010 — Garis Panduan Permohonan Permit Masuk Mengikut Kaedah Sistem Mata (Point System)' telah dipatuhi (lihat perenggan 21, 23 & 27).

(2) Syarat kedua yang mesti dipenuhi oleh pemohon di bawah s 44(1)(a) ARS adalah bahawa kecederaan pemohon adalah disebabkan oleh penolakan atau pelaksanaan tugas berkanun oleh penjawat awam. Dalam kes semasa, pemohon gagal menunjukkan kegagalan responden pertama untuk melaksanakan tugas berkanun yang diwajibkan terhadapnya di sisi undang-undang. Secara keseluruhannya, pemohon gagal memenuhi syarat-syarat yang diperlukan di bawah s 44(1)(a) ARS (lihat perenggan 30 & 32–33).

(3) Oleh kerana pemohon mempunyai remedi alternatif di bawah undang-undang dan pemohon juga sebenarnya telah merayu terhadap keputusan responden pertama kepada responden kedua, mahkamah mendapati pemohon telah gagal memenuhi syarat yang diperlukan di bawah s 44(1)(d) ARS (lihat perenggan 40).

(4) Pernyataan yang dibuat oleh pemohon pada perenggan 5 afidavit sokongan pemohon adalah bertentangan dengan A 41 k 5(1) Kaedah-Kaedah Mahkamah 2012. Afidavit mesti mengandungi fakta-fakta yang boleh dibuktikan oleh pembuat pernyataan tersebut berdasarkan pengetahuannya sendiri. Fakta-fakta yang dinyatakan di dalam afidavit tersebut hanya dapat disahkan oleh ibu pemohon kerana pemohon tidak mempunyai pengetahuan langsung mengenai apa yang sebenarnya berlaku. Keterangan ini hanyalah keterangan dengar cakap. Kegagalan untuk mematuhi syarat di atas akan melenyapkan nilai probatif pernyataan atau keterangan tersebut dan pernyataan tersebut boleh diketepikan oleh mahkamah. Oleh itu, dalam permohonan semasa, mahkamah tidak memberikan pemberatan terhadap pernyataan pemohon dalam perenggan 5 afidavit sokongan pemohon kerana ianya hanyalah keterangan dengar cakap (lihat perenggan 45–47).

(5) Permohonan semasa difailkan terhadap responden-responden iaitu Jabatan Imigresen Malaysia (Cawangan Perak) sebagai responden pertama dan Kementerian Dalam Negeri Malaysia sebagai responden kedua yang bukan merupakan entiti yang diakui oleh undang-undang yang berkaitan. Pemohon tidak memohon untuk mengubah pihak-pihak dalam permohonan ini. Oleh itu, permohonan pemohon ditakdirkan untuk gagal sejak awal lagi (lihat perenggan 48–49).]

Cases referred to

Bencon Development S/B v MPPP & Ors [1999] 2 MLJ 385, HC (refd)
Ho Kooi Sang v Universiti Malaya [2004] 2 MLJ 516; [2004] 5 CLJ 445, HC (refd)
Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor [2017] 1 MLJ 563, FC (refd)
Koon Hoi Chow v Pretam Singh [1972] 1 MLJ 180b, FC (refd)
Menteri Besar Negeri Pahang Darul Makmur v Seruan Gemilang Makmur Sdn Bhd [2010] 4 MLJ 360, CA (refd)
Metal Industry Employees Union v Registrar Of Trade Unions & Ors [1976] 1 MLJ 220, FC (refd)
Ooman Chung @ Voo Man Chung v Director of Lands and Surveys, Sabah & Anor [2015] MLJU 2237, CA (refd)
Pengarah Kastam Negeri Johor & Anor v Kedai Makan Kebun Teh (Sutera Utama) Sdn Bhd & Ors and another appeal [2014] 4 MLJ 377, CA (refd)
Pua Kiam Wee v Ketua Pengarah Imigresen Malaysia & Anor [2017] MLJU 902, CA (refd)
Ringgit Exoticka Sdn Bhd v Pengarah Tanah & Galian Selangor & Ors [2014] 8 MLJ 111, HC (refd)
Robin Tan Pang Heng @ Muhammad Rizal bin Abdullah (suing as public officer at Penang Turf Club) v Ketua Pengarah Kesatuan Sekerja Malaysia & Anor [2011] 2 MLJ 457, FC (refd)
Robin Tan Pang Heng @ Muhammad Rizal bin Abdullah (suing as public officer at Penang Turf Club) v Ketua Pengarah Kesatuan Sekerja Malaysia & Anor [2010] 4 MLJ 771, CA (refd)
Selvaraju a/l Ponniah v Suruhanjaya Perkhidmatan Awam Malaysia & Anor [2007] 7 MLJ 1, FC (refd)
Semantan Estate (1952) Sdn Bhd v Collector of Land Revenue Wilayah Persekutuan [1987] 2 MLJ 346; [1987] CLJ Rep 329, SC (refd)
Vestime Corporation Sdn Bhd v YBLE Resources Sdn Bhd & 5 Ors [2006] 3 MLJ 554, HC (refd)

Legislation referred to

Federal Constitution art 19(1)
Immigration Act 1959/63 ss 3(2), 10, 13, 59A(1), (2)
Rules of Court 2012 O 41 r 5(1)
Specific Relief Act 1950 ss 44, 44(1), 44(1)(a), (d), Chapter VII, Part 2

Dasuki bin Mat Noh (Amin Amirul & Partners) for the applicant.
Maisarah bt Juhari (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Hashim Hamzah J:

INTRODUCTION

[1] This is the hearing of the applicant's application vide originating summons dated 23 January 2019 for the following reliefs, namely:

(a) an order for mandamus to issue an entry permit to the applicant by the first respondent;

(b) an order for mandamus against the respondents to consider, allow and endorse the entry permit to the applicant before the citizenship status is awarded to the applicant under art 19(1) of the Federal Constitution;

(c) an order of mandamus against the respondents or any other public authorities to take action which is reasonable in order to execute the order of this court;

(d) any other orders that is deemed fit by this court; and

(e) costs in the cause.

BRIEF FACTS

[2] Briefly, the facts in the present case are as follows.

[3] The applicant was born in Santa Rosa, California, United States on 25 September 1993. The applicant is an American citizen and is currently a holder of US Passport No 488925315 which expires on 6 December 2021.

[4] The applicant is currently 26 years old. She was a student at Monash University Sunway Malaysia. She was holding a Malaysian Student's Pass No PD9977716 which expired on 18 March 2019.

[5] The applicant's biological mother is Teoh Jyr Ling, a Malaysian citizen whereas the applicant's father, Yat Chuen Chau, is an American citizen. They were married on 19 June 1990.

[6] The applicant's parents were officially divorced on 19 January 2010. The applicant together with her mother came to live in Malaysia since then. The applicant had been continuously living in Malaysia under the student's pass (for various schools and tertiary education centers) for the past 15 years until the latest student's pass which expire on 18 March 2019.

[7] On 12 September 2018, the applicant went to the Entry Permit Division of the first respondent's office to apply for an entry permit. On the

same day itself, after the filing of the applicant's application, the first respondent' officer informed the applicant and her mother that the applicant only obtained 35 out of 120 marks, to which the passing mark is 65 marks.

[8] The applicant had also filed an application for entry permit to the Federation, to which the Royal Malaysian Police of Perak wanted to conduct an interview with the applicant and her mother but to no avail as the address provided by the applicant was empty and the telephone number provided by the applicant was uncontactable.

[9] A letter dated 3 October 2018 was issued by the first defendant to the applicant regarding the rejection of the applicant's application for the said entry permit.

[10] The applicant was dissatisfied with the decision of the first respondent's head of the Visa, Pass and Permit Division and filed an appeal to the second respondent vide a letter dated 18 October 2018 and 20 December 2018.

[11] As of now, the applicant's appeal to the second respondent is still pending decision.

[12] On 23 January 2019, by way of an originating summons, the applicant filed this application for the determination of this court.

ISSUES

[13] The issues raised by the parties in the present case can be summarised as follows:

(a) whether the applicant have fulfilled the conditions for a mandamus order under s 44 of the Specific Relief Act 1950 (Revised 1974) (Act 137) ('the SRA 1950');

(b) whether the applicant's deposition at para 5 of the applicant's affidavit in support affirmed on 23 January 2019 ('applicant's affidavit in support') is hearsay evidence; and

(c) whether the respondents was correctly named in the present case.

LAW

[14] First and foremost, the enforcement of public duties by the courts are governed under Chapter VII of Part 2 of the SRA 1950. In particular, s 44 of

the SRA 1950 provides as follows:

Section 44 Power to order public servants and others to do certain specific acts.

(1) A Judge may make an order requiring any specific act to be done or forborne, by any person holding a public office, whether of a permanent or a temporary nature, or by any corporation or any court subordinate to the High Court:

Provided that —

(a) an application for such an order be made by some person whose property, franchise, or personal right would be injured by the forbearing or doing, as the case may be, of the said specific act;

(b) such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or court in his or its public character, or on the corporation in its corporate character;

(c) in the opinion of the Judge the doing or forbearing is consonant to right and justice;

(d) the applicant has no other specific and adequate legal remedy; and

(e) the remedy given by the order applied for will be complete.

(2) Nothing in this section shall be deemed to authorize a Judge —

(a) to make any order binding on the Yang di-Pertuan Agong;

(b) to make any order on any servant of any Government in Malaysia, as such, merely to enforce the satisfaction of a claim upon that Government; or

(c) to make any order which is otherwise expressly excluded by any law for the time being in force. (Emphasis added.)

[15] Plain reading of s 44(1) of the SRA 1950 clearly provides that the five conditions laid out under the provisos to the said provision, must be fulfilled by the applicant before a mandamus order can be granted by the court.

[16] The same view was observed in the case of *Koon Hoi Chow v Pretam Singh* [1972] 1 MLJ 180b in which Sharma J (as he then was) held as follows:

Five conditions are laid down in section 44 and these conditions are the five provisos contained in the section which the applicant must satisfy. They are cumulative and all of them must be fulfilled. The question therefore is whether the applicant has succeeded in bringing his case within the purview of section 44 of the Specific Relief Ordinance.

FIRST ISSUE: WHETHER THE APPLICANT HAVE FULFILLED THE CONDITIONS FOR A MANDAMUS ORDER UNDER S 44(1) OF THE SRA 1950

[17] The pertinent issue in the present application is whether the plaintiff had successfully shown that all the conditions under s 44(1) of the SRA 1950 has been fulfilled so as to allow this court to grant a mandamus order as prayed.

[18] In addressing this issue, reference is again made to the case of *Koon Hoi Chow v Pretam Singh* where it was held as follows:

> There are four prerequisites essential to the issue of an order under section 44 or of a *mandamus:*
>
> (1) Whether the applicant has a clear and specific legal right to the relief sought;
>
> (2) Whether there is a duty imposed by law on the respondent;
>
> (3) Whether such duty is of an imperative ministerial character involving no judgment or discretion on the part of the respondent; and
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> (4) Whether the applicant has any remedy, other than by way of mandamus, for the enforcement of the right which has been denied to him.

[19] In the present application, the learned senior federal counsel ('SFC') for the respondents mainly submitted that the applicant had failed to satisfy two of the conditions set out under s 44(1)(a) and 44(1)(d) of the SRA 1950 respectively, where:

(a) the applicant failed to show that the applicant's property, franchise, or personal rights would be injured if the respondents failed to carry out its statutory duties as prescribed under the law; and

(b) there was other specific and adequate legal remedies which had not been exhausted by the applicant.

SECTION 44(1)(a) OF THE SRA 1950

[20] With regard to the first condition, ie under s 44(1)(a) of the SRA 1950, I am of the considered opinion that there are two limbs to this proviso.

[21] The first limb is that the applicant must show that she has a specific legal right to the relief sought. In the Supreme Court case of *Semantan Estate (1952) Sdn Bhd v Collector of Land Revenue Wilayah Persekutuan* [1987] 2 MLJ 346; [1987] CLJ Rep 329, it was held as follows:

> Then there is the important question of the appellant's standing. *He must have a specific legal right to ask the Court to exercise its discretion to issue the order of*

mandamus. Such discretion must be exercised judicially. *If the appellant has no such right then he is not entitled to mandamus*. As has been pointed out he has a right of appeal against the decision of the High Court in refusing to hear the reference. *He has failed to avail himself of the alternative remedy*. This point was not seriously contended by the parties before the learned Judge. We think it is too late for him to say he had no alternative remedy. *Accordingly, we are of the view that he has no specific legal right to apply for mandamus in this case.* (Emphasis added.)

[22] See also the High Court case of *Ho Kooi Sang v Universiti Malaya* [2004] 2 MLJ 516; [2004] 5 CLJ 445 on the same issue.

[23] Coming back to the present application, the learned SFC submitted that the applicant has no specific legal right to the relief sought in the present application since any decision of the Minister or the Director General of Immigration under s 59A(1) of the Immigration Act 1959/63 (Act 155) ('Immigration Act 1959/63') cannot be reviewed or appealed at all unless it can be shown that there is a non-compliance with procedural requirements of the Immigration Act 1959/63 or the regulations governing that act or decision. This includes an application for a mandamus order (s 59A(2) of the Immigration Act 1959/63).

[24] It was further submitted by the learned SFC that the applicant's application to the first respondent's office was governed by a circular ie the 'Pekeliling Imigresen Malaysia Terhad Bil 3 Tahun 2010 — Garis Panduan Pemohonan Permit Masuk Mengikut Kaedah Sistem Mata (Point System)' dated 1 July 2010 ('the said Circular').

[25] The facts in the present application clearly shows that the applicant did not achieve the passing mark of 65 as required under para 4.5 of the said Circular. Nothing was shown that the grading of the applicant's marks were done in contravention with the said Circular (as can be seen from exh K1–4 in the respondents' affidavit in reply affirmed on 11 March 2019).

[26] In fact, the learned counsel for the applicant merely contended that the discretionary power of both the respondents to analyse, evaluate and determine the relevant issues relating to the application was misused and unconstitutionally applied without pointing any flaw in the decision making process.

[27] I find that there was nothing in the applicant's affidavit evidence to show that there was any breach of procedural requirements in the exercise of the first respondent's discretion under ss 3(2), 10, 13 of the Immigration Act 1959/63 as all the standard operating procedures under the said Circular had been complied with.

[28] In the case of *Pua Kiam Wee v Ketua Pengarah Imigresen Malaysia & Anor* [2017] MLJU 902, the Court of Appeal had in no uncertain terms held that:

> [14] Thus, the effect of the ouster provision as provided in section 59A has excluded judicial review of the act of the first respondent in making the impugned decision, by stripping the court of its supervisory judicial function. Parliament having excluded judicial review under Act 155, it is not permissible for the court to intervene and disturb a statutorily unreviewable decision (*Sugumar*).

[29] The applicant also did not plead that the said Circular contravened any provision of the Immigration Act 1959/63 so there is no apparent need for this court to consider such matter. In the case of *Ooman Chung @ Voo Man Chung v Director of Lands and Surveys, Sabah & Anor* [2015] MLJU 2237 the Court of Appeal held as follows:

> [52] We had also examined each and every affidavit filed by the applicant in the High Court, the notes of proceedings in the High Court, and the written submissions for the applicant in the High Court. We noted that the issue of non-compliance with s 6 of the LAO was never raised in the High Court. That explained the absence of any reference to this issue in the judgment of the learned judicial commissioner.
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> [53] In those circumstances we were of the considered view that the issue of non-compliance with section 6 of the LAO was not an issue that we needed to consider.

[30] Next, the second limb that must be satisfied by the applicant under s 44(1)(a) of SRA 1950 is that the applicant's injury will result from the forbearing or doing of a statutory duty by a person who holds public office.

[31] It is trite that the order of mandamus can only be issued to enforce the performance of a public duty where there has been a failure to perform the same. However, it cannot be used as a remedy to compel the exercise of a power by any person or authority (see *Menteri Besar Negeri Pahang Darul Makmur v Seruan Gemilang Makmur Sdn Bhd* [2010] 4 MLJ 360 (CA)).

[32] As can be seen above and from the facts of the case, the applicant failed to show any failure on the part of the first respondent to perform any statutory duties compelled to them in law. Again it is important to reiterate that this court cannot be used as a mean to compel the exercise of any discretion or judgment on the part of the respondents (*Koon Hoi Chow v Pretam Singh*).

[33] For the foregoing reasons, I find that the applicant had failed to establish the necessary requirement under s 44(1)(a) of the SRA 1950.

SECTION 44(1)(d) OF THE SRA 1950

[34] The next issue is whether the applicant had satisfied the requirement under s 44(1)(d) of the SRA 1950, ie whether the applicant had shown that the applicant had no other specific and adequate legal remedy before resorting to this application.

[35] On this issue, it was submitted by the learned SFC, to which I agree that the applicant had not exhausted the remedy under the Immigration Act 1959/63 since the applicant had appealed against the decision of the first respondent to Minister of Home Affairs which was pending for determination. This fact was not disputed by the applicant.

[36] The Federal Court in the case of *Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 1 MLJ 563 had in no uncertain terms held that the right of the applicant to come to court only arises once the applicant had availed herself of any remedy laid down by the law. The Federal Court held in the following words:

> [58] To dispel any fear of a taxpayer, merely because he has to face such an awesome body in the form of the government, Gill FJ in *Sun Man Tobacco Co v Government of Malaysia* [1973] 2 MLJ 163 had occasion to state:
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> > The doors of justice are not shut to him merely because its claimant is the Government, but he has to enter the doors of the Special Commissioners first to raise the plea of non-observance of the principle of natural justice or to establish that the Director-General acted arbitrarily and in a non-judicial manner. *It is only after he has availed himself of that remedy as laid down by the law that he has a right to come to the courts*. (Emphasis added.)

[37] It is also patently clear that when there is an alternative remedy provided by the law, it is premature to invite the court to review the decision of the respondents. In the Court of Appeal case of *Robin Tan Pang Heng @ Muhammad Rizal bin Abdullah (suing as public officer at Penang Turf Club) v Ketua Pengarah Kesatuan Sekerja Malaysia & Anor* [2010] 4 MLJ 771, it was held in the following words:

> [24] In fact it is premature to invite the court to review the decision of the first respondent when the provision for appeal against the first respondent to the Minister is comprehensively laid down in the Trade Unions Act 1959. Thus there is no illegality in the action of the first respondent.
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> [25] Regarding the word 'may' in the relevant provision of the Act, we are of the view that this gives an option to the appellant to appeal to the Minister, rather than giving a right to apply for judicial review when there exists an alternative remedy.

[38] The Federal Court affirmed the decision by the Court of Appeal in the

A above case, reported as *Robin Tan Pang Heng @ Muhammad Rizal bin Abdullah (suing as public officer at Penang Turf Club) v Ketua Pengarah Kesatuan Sekerja Malaysia & Anor* [2011] 2 MLJ 457 in the following words:

> B [17] In our opinion the legislation by stipulating that the decision of the Minister is to be final is itself indicative that when there is already stipulated a second tier identified in the legislation, Courts are not authorised to interfere for the statutory right that has accrued is not purely formal but mandatory. In other words the statutory right has to be exhausted.

C **[39]** See also *Metal Industry Employees Union v Registrar Of Trade Unions & Ors* [1976] 1 MLJ 220 (FC) and *Pengarah Kastam Negeri Johor & Anor v Kedai Makan Kebun Teh (Sutera Utama) Sdn Bhd & Ors and another appeal* [2014] 4 MLJ 377 (CA).

D **[40]** Since the applicant had alternative remedy under the law and had in fact appealed against the decision of the first respondent to the second respondent, I find that the applicant had failed to satisfy the necessary requirement under s 44(1)(d) of the SRA 1950.

E THE APPLICANT'S CASE

[41] The main crux of the applicant's case in the present application revolves around the issue of the applicant's right to citizenship under art 19(1) of the Federal Constitution.

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[42] At this juncture, I agree with the learned SFC that this issue is currently non-existent in the present application since the reliefs sought for by the applicant are only pertaining to the granting of entry permit by the respondents and nothing involving the grant of citizenship to the applicant. I also agree that the power to grant citizenship lies with the federal government and the Minister of Home Affairs of whom both were not named as parties to the present application.

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H **[43]** As such, I am of the considered view that there is no apparent need for this court to address any submissions on this issue.

SECOND ISSUE: WHETHER THE APPLICANT'S DEPOSITION AT PARA 5 OF THE APPLICANT'S AFFIDAVIT IN SUPPORT IS HEARSAY I EVIDENCE

[44] Another issue raised is whether the applicant's deposition at para 5 of the applicant's affidavit 1 is hearsay evidence. Paragraph 5 of the applicant's affidavit 1 read as follows:

5. Ibu saya pernah beberapa kali ke jabatan imigresen untuk bertanyakan prosedur dan tatacara untuk mendapatkan status kewarganegaraan kepada saya ketika saya masih berumur 12 tahun. Namun jawapan dan informasi yang ibu saya perolehi adalah tidak memuaskan kerana jabatan imigresen menyatakan secara akuan mulut sahaja bahawa saya masih lagi tidak layak secara merit untuk memohon kewarganegaraan. Saya juga tidak diterangkan apakah yang dimaksudkan dengan kelayakan bermerit tersebut. Ibu saya ada juga beberapa kali pergi ke jabatan imigresen selepas itu pada tahun bermula dari 2008, 2011, 2012 dan 2015 namun hasratnya hampa kerana tidak diterangkan secara lanjut dan terperinci tentang prosedur untuk memohon permit masuk sebelum taraf pemastautin tetap dan kewarganegaraan diberikan.

[45] I agree with the learned SFC that this deposition was made in contravention with O 41 r 5(1) of the Rules of Court 2012 ('the ROC 2012'). An affidavit must contain facts that the deponent to his own knowledge is able to prove. The facts deposed therein can only be verified by the applicant's mother since the applicant has no direct knowledge regarding what actually transpired. This evidence is purely hearsay.

[46] Failure to observe the abovementioned requirement will discard the particular deposition or evidence of any probative value and the impugned statement may be expunged by the court (see *Ringgit Exoticka Sdn Bhd v Pengarah Tanah & Galian Selangor & Ors* [2014] 8 MLJ 111).

[47] As such, in the present application, I give no weight to the applicant's deposition in para 5 of the applicant's affidavit in support for being purely hearsay evidence.

THIRD ISSUE: WHETHER THE RESPONDENTS WAS CORRECTLY NAMED IN THE PRESENT CASE

[48] Regarding this issue I agree with the learned SFC that this application was filed against the respondents ie Jabatan Imigresen Malaysia (Cawangan Perak) as the first respondent and Kementerian Dalam Negeri Malaysia as the second respondent which were not entities recognised by the relevant laws (see *Selvaraju a/l Ponniah v Suruhanjaya Perkhidmatan Awam Malaysia & Anor* [2007] 7 MLJ 1, *Vestime Corporation Sdn Bhd v YBLE Resources Sdn Bhd & Ors* [2006] 3 MLJ 554 and *Bencon Development S/B v MPPP & Ors* [1999] 2 MLJ 385).

[49] The applicant did not apply to amend the parties to the present application. Hence, the applicant's application was doomed to fail from the very beginning.

A CONCLUSION

[50] For reasons enumerated above, the applicant's application is hereby dismissed with no order as to cost.

B *Applicant's application dismissed with no order as to costs.*

Reported by Dzulqarnain Ab Fatar

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